

***If You Can't Protect What You Own--
You Don't Own Anything***

Comments by
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before the
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Intellectual Property

on
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and the Online Copyright Liability Limitation Act

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I am pleased that this Committee is taking a look at the topic of online service provider liability. In the revolution in cyberspace now entering a high velocity stage, there is no issue more challenging than the protection of copyrighted intellectual property. This is not something to be treated casually, or dealt with a haphazard gaze. To those who want to change copyright law to "fix" the problem, my response is "Tread lightly, think deeply."

No institution of the Congress is better situated than this Committee to give this issue the long hard look that is required. This Committee understands with appreciative clarity the ascending curve of global revenues produced by American copyright industries who deal in intellectual property: revenues emerging from an international appetite for American computer software, video games, movies, television programs, home videos, books, musical recordings. The copyright industries produce and market America's most wanted export on every continent. In this country, the copyright industries contribute a quarter of a TRILLION dollars each year to the Gross Domestic Product and each year that

sublime number grows larger. Three million American jobs are directly dependent on intellectual property, and an equal number benefits indirectly. This is not bean bag business. Moreover, these industries account for over \$50 BILLION in exports and foreign sales each year, also increasing every year. Over the next decade no product grown, manufactured, or created in this land will surpass American copyright industries' global sweep, enticing multi-millions of viewers, users, audiences of all cultures, countries and creeds. Which is why one of this nation's indispensable objectives must be, has to be, to protect and safeguard intellectual property against pilfering, unauthorized use and illegal copying. The plain truth is if you cannot protect what you own, you don't own anything.

The copyright industries generally, and the motion picture industry specifically, are excited about the explosive growth of the Internet and other forms of digital distribution of copyrighted works. We know that this new technology will allow us to reach more markets faster, with a greater diversity of products, and with

less expense and hassle. In the long run -- and, very probably sooner than we think, digital networks will be an incredible bonanza for the American consumer. Similarly world consumers will have easy access to more entertainment choices than ever before.

But it is no secret that our excitement about these new frontiers is freighted with anxiety. The very same technology that eases the legitimate distribution of our creative products around the world also entices copyright piracy: the theft of the intellectual property that is the basis for a great economic and cultural success story that has not, to this hour, been duplicated, matched or cloned by any other nation.

Internet piracy is not a "maybe" problem, a "could be" problem, a "might someday be" problem. It is a "now" problem. Later, sooner than we think, it could become a cancer in the belly of our business. In odd corners of the World Wide Web, in linked sites based in Europe, Asia and Australia as well as the U.S., a pirate bazaar is underway. Its customers span the globe, wherever

the Internet reaches, and its wares are the fruits of American creativity and ingenuity.

Today, Internet piracy focuses on computer programs, video games, and recorded music. Movies and videos are not much in evidence -- yet. That's because our audio-visual content is so rich in information that it can't yet move easily everywhere in the digital network -- the volume of flow is too great for some of the pipes. We know that the reprieve is temporary, however. The same technology that will smooth the way for legitimate delivery of video on demand over digital networks will also prime the pump for copyright pirates.

MPAA is very familiar with the great video pirate marketplaces of today. In China, in Russia, in Italy, in scores of other countries, video pirates steal more than \$2 billion of our intellectual property each year. By spending millions of dollars on anti-piracy campaigns, and with the invaluable help of Congress and of the Executive Branch, MPAA is making great progress in the fight against these pirate cornucopias. I just recently returned from

Russia where in a meeting with the Prime Minister, that nation, urged on by its directors, writers, actors, producers, distributors and businessmen, has endorsed and pledged to support a spacious joint anti-piracy plan led by an amalgam of Russian and American companies. So, even Russia which is literally infested with pirates, has now determined it must now go to war against intellectual property thieves in order to save its own creative industry.

But we know that the next battleground will be in cyberspace: a virtual pirate shopping mall that -- in scope, volume and agility of operation - may dwarf those we are fighting today.

Of one fact you may be certain: The Internet will be the crucial link in the pirate operations of tomorrow. Today, the pirate who obtains, by stealth or malfeasance, a copy of the latest blockbuster picture before it is even released in the theaters must cope with formidable distribution problems. Physical copies must be smuggled across borders, warehoused, and parceled out to distributors before reaching the ultimate consumer. Alas, digital networks will soon make this complex and dangerous undertaking

cheap and simple. The pirate master will be digitized, posted on the Web, and made available to Net surfers all over the world. Or, the master will be downloaded over the Internet to a digital video recorder half a world away, that can churn out thousands of pristine, perfect copies at the touch of a button, for immediate distribution to customers. By the time those pirate DVD copies hit the street, the pirate web site will have disappeared, to be set up anew tomorrow in a different country, where a different current hit will be available.

This is the context in which this Committee should plant its investigatory flag.

Let's be clear right up front. Most of the millions of customers of OSP's and Internet service providers (ISP's) are law-abiding and ethical. They use these services to reach the 'Net for perfectly legitimate purposes: to communicate by electronic mail; to participate in online communities of shared interests; to access news and information; and to reach the mushrooming number of legitimate, authorized sites that offer entertainment, including sites

affiliated with all of our studios. But at the same time, OSP's and ISP's are also indispensable for the growth of Internet piracy. None of the piracy scenarios I've outlined could possibly take place without the use of these services. The question before this Committee is this: who is responsible, who is accountable, for copyright infringements that take place over digital networks? And if no one is responsible, if no one is accountable, then how will we stop the flood of piracy that will surely follow?

OSP's and other telecommunications companies have a key role to play in ensuring that this nightmare scenario never comes to pass. They must shoulder their fair share of this burden. Of course copyright owners must take the lead. Our vigilance is essential. Internet piracy demands that we become the watchmen on the tower. But also essential is the cooperation of the service providers. Our copyright law must continue to provide the right incentives to stimulate that cooperation. Accountability, under appropriate circumstances, for copyright violations committed by

network users is one of the legal incentives provided under current law.

Some service providers paint a terrorizing script of their own. Unless the copyright law is changed to immunize them, so they say, they foresee a flood, not of Internet piracy, but of liability litigation. They assert that the burden of taking steps to prevent and detect online piracy will be crushing, that it will stunt the growth of the Internet and take down with it many of the high-flying cyberspace ventures that the World Wide Web has spawned.

This Committee must cast a cool, appraising eye on those predictions. They fly in the face of the experience of the first few years of this Internet revolution.

The feared flood of infringement litigation has never materialized. In fact, it is remarkable how few lawsuits have been brought in which copyright owners seek to hold OSP's or ISP's financially responsible for infringements committed on their networks. This is telling evidence that the sky is not falling, that that the incentives provided by current law are working pretty well

to encourage cooperation between copyright owners and service providers in the fight against piracy. I know that in many instances, motion picture companies and online service providers have worked together quickly, quietly and effectively to nip such situations in the bud.

Of those few cases that have gone to court, none has resulted in the imposition of debilitating damage awards on an "innocent" OSP or ISP that had no involvement, other than providing network services, in infringing activity. Where providers have been held liable, it's quite clear from the facts of specific cases that they were well aware of, or were even active participants in, the violations enabled by their services.

As for the assertion that the threat of infringement liability is a dagger pressed against the jugular of the Internet, well, the best that can be said is that it simply is not so. The growth rates of the business of providing access to the Internet are astronomical. The Interactive Services Association estimates that revenue for providing Internet access nearly quadrupled between 1995 and

1997; over the same time span, the number of households in North America with online access more than doubled. The subscriber base of the single leading OSP alone, America Online, reached 6.2 million in the second quarter of 1996, more than double the total of a year earlier. These statistics are the envy of many other sectors of the U.S. economy. The forward velocity of Internet growth is approaching warp speed; and if, as some telecommunications companies claim, the copyright liability issue is a drag on that momentum, mere mortals have been virtually unable to detect it.

As the Committee takes its long, hard look at this issue of online service provider liability, it will see a legal status quo that functions well. Over many decades, the courts have developed doctrines of vicarious and contributory liability that determine when one party -- such as a service provider -- can justly be held responsible for copyright infringements that are directly committed by another party -- such as network users. In the few lawsuits that have been decided so far, the federal courts have begun to apply these doctrines to the Internet environment, and the results,

by and large, have been fair and reasonable. Before jumping straight to legislative "fixes" of the online liability "problem,"

Congress must specifically identify what -- if anything -- is broken in the current law. In other words, it should approach this issue with care, caution and a respect for continuity in our copyright law.

If it does so, I believe it will conclude that any change in the statute on this issue is, at best, premature.

You may hear the argument that giving service providers full or partial immunity from copyright infringement liability is something the United States must do in order to implement the two new treaties negotiated last year at the World Intellectual Property Organization. You should reject that argument because it is manifestly untrue. Some countries did propose that the treaty be written in a way that would require ratifying countries to establish these immunities; but all those proposals were firmly rejected in Geneva. The treaties as actually drafted give the United States, and every other country, sufficient latitude to craft the liability rules that best fit their own particular legal systems, so long as the law

secures the rights guaranteed by the treaties and provides adequate remedies to deter and punish piracy.

I also urge you to approach with skepticism a variation on this argument that will certainly be put forward by some of our colleagues in the telecommunications business. It may be true, they will concede, that OSP liability relief isn't required in order to implement the treaties, but Congress should handle these issues in tandem anyway. Let me give you three reasons why you should resist this song, so lamentably out of tune.

First, ratifying and implementing the treaties should be a top priority for the United States. Implementing legislation already must address some controversial and complex issues, such as how best to outlaw circumvention of technologies used to protect copyrighted material against unauthorized access and copying. If online service provider liability is injected into this mix, the level of complexity and controversy will take a quantum leap. Any hope of rapid U.S. implementation of the treaties within the one year time frame set by President Clinton earlier this month -- will go a-

glimmering, and with it the solidity of the U.S. claim to leadership on global copyright policy.

Second, if treaty implementing legislation is expanded to embrace issues that are extraneous to the requirements of the treaties, it won't stop with OSP liability. There will be plenty of other copyright ornaments to hang on this legislative Christmas tree, thus further clouding the prospects for rapid U.S. adherence.

Third, even if OSP/ISP immunity legislation is "linked to," rather than "incorporated in," legislation to implement the new treaties, that subtle distinction will be completely lost on one of the important audiences for this exercise: governments around the world who are looking to the U.S. to lead the way into the new level of international copyright standards that these treaties represent. If these countries perceive that the U.S. is relaxing its liability standards at the same time that it is implementing the treaties, they will do likewise. I have great confidence that if the Congress of the United States chooses to go this route, it will at least try to ensure that strong and effective remedies against Internet-based

piracy are preserved. I have much less confidence that the same will be true in the legislatures of countries around the world which are already hotbeds of video piracy.

As more and more of our trade in copyrighted materials moves to digital networks, we must remember the truism that any chain is only as strong as its weakest link. If we were to change our law to further limit the liability of OSP's and ISP's, the weakening of that worldwide chain of copyright protection would be a clear and present danger, inviting the slow undoing of America's most precious trade asset, its native-born intellectual property.

Thank you.